**IN THE INCOME TAX APPELLATE TRIBUNAL,
KOLKATA-GUWAHATI 'e-COURT', KOLKATA
[Virtual Court Hearing]**

**Before Shri Rajpal Yadav, Vice-President (KZ)
&
Dr. Manish Borad, Accountant Member**

**I.T.A. Nos. 219, 222 & 224/GAU/2019
Assessment Years: 2012-2013, 2015-16, 2012-13**

Agrim Infraproject Private Limited,..... Appellant
C/o. Rahul Raj Jain & Co.,
H. No. 15, 1st Floor, Bye Lane-2, Shaktigarh Path,
Bhangagarh, G.S. Road, Assam-781005
[PAN:AAHCA2413P]

-Vs.-

Deputy Commissioner of Income Tax,.... Respondent
Circle-3, Guwahati,
Office of the Deputy Commissioner of Income Tax,
6th Floor, Aayakar Bhawan,
Christian Basti, G.S. Road, Assam-781005

Appearances by:
Chirag on behalf of Shri Miraj D. Shah, Advocate, appeared on behalf of the assessee
Shri N.T. Sherpa, JCIT, appeared on behalf of the Revenue

Date of concluding the hearing : January 10, 2023
Date of pronouncing the order : April 05, 2023

O R D E R

Per Rajpal Yadav, Vice-President (KZ):-

These captioned appeals being ITA Nos. 219, 222 & 224/GAU/2019 filed by the assessee are against the orders of ld. Commissioner of Income Tax (Appeals), Guwahati-2, Guwahati dated 15.02.2019 for A.Y. 2012-13, dated 15.02.2019 for A.Y. 2015-16 and dated 18.02.2019 for A.Y. 2012-13 passed under section 250 of the Income Tax Act, 1961.

2. In ITA No. 219, & 222/GAU/2019, the assessee has raised the following grounds:-

> *(1) That the ld. CIT(A) has fails to appreciate all the averments/objections taken by the appellant in its written submission dated 11.10.2018 and was in gross violation of natural justice while dismissing the case without considering the written submission filed through online on 11.10.2018. That the ld. CIT(Appeals) ought to have decided the issue raised by the appellant instead of rejecting the same without entertaining.*
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> *(2) That the ld. CIT(Appeals) has erred in law and in fact while not adjudicating the addition of Rs.4,70,00,000/- (for A.Y. 2012-13), Rs.2,05,00,000/- (for A.Y. 2013-14), Rs.1,75,00,000/- (for A.Y. 2015-16) made by the Assessing Officer u/s 68 of I.T. Act, 1961 without appreciating the fact of the case mentioned in Form No. 35 itself.*

3. In ITA No. 224/GAU/2019, the assessee has raised the following ground :-

"That the ld. CIT(Appeals) was not justified while confirming addition of Rs.2,07,20,125/- without properly appreciating the fact of the case".

4. The assessee has raised the following revised grounds of appeal in ITA No. 219/GAU/2019:-

(1) For that in the facts and circumstances of the case the appellate order passed was in violation of principals of natural justice hence is bad in law and be quashed.

(2) For that in the facts and circumstances of the case the assessment made u/s 153A of the IT Act 1961 was bad in law and hence the appellate order passed by the Ld CIT(A) based on the assessment order is bad in law and be quashed.

(3) For that in the facts and circumstances of the case the assessment made u/s 153A of the IT Act 1961 was without any satisfaction of the relevant Assessing officer hence the proceedings were bad in law and hence the order be quashed.

(4) For that in the facts and circumstances of the case theadditions/disallowances made u/s 153A of the IT Act 1961 was beyond the scope of the said section and hence bad in law and hence the order be quashed and/or the addition/ disallowances be deleted.

(5) For that in the facts and circumstances of the case the additions/disallowancesmade u/s153A of the IT Act1961was not based on any incriminating documents /material/ evidences found in the search which and hence the additions/ disallowance made were beyond the scope of the said section hence the appellate order passed by the Ld CIT(A) based on the assessment order is bad in law and be quashed and/or the addition/ disallowances be deleted.

(6) For that in the facts and circumstances of the case the assessment had abetted and hence the additions/ disallowances made u/s 153A of the IT Act 1961 was beyond the scope of the said section and hence the appellate order passed bythe Ld CIT(A) based on the

assessment order is bad in law and be quashed and/or the addition/ disallowances be deleted.

(7) For that in the facts and circumstance the Learned Commissioner of Income Tax Appeals erred in upholding the addition of Rs.4,70,00,000 made u/s 68 of the income tax Act, 1961 as unexplained cash credit on account of share capital/security premium/share application money was uncalled for, unjustified and thus the same be deleted.

(8) For that in the facts and circumstance of this case the material based on which the Ld Assessment Officer passed the assessment order are collected behind the back of the assessee and which were not provided during the course of assessment proceeding, thus material should be excluded/ignored for the purpose of this case.

(9) For that in the facts and circumstances of the case the statement of third parties on which the Ld Assessment officer relied during the course of assessment proceeding were not subjected to cross examination for the assessee, thus the third-party statement relied upon should be excluded/ignored for the purpose of this case.

(10) For that the learned CIT (Appeals) erred in confirming the interest u/s 234 A/B/C the same was unjustified and hence the same be recalculated as per the applicable law.

(11) The appellant craves leave to produce additional evidences in terms of Rule 29 of the Income Tax (Appellate Tribunal) Rules 1963.

(12) *The appellant craves leave to press new, additional grounds of appeal or modify, withdraw any of the above grounds at the time of hearing of the appeal.*

5. The assessee has raised the following revised grounds of appeal in ITA No. 222/GAU/2019:-

(1) For that in the facts and circumstances of the case the addition of Rs. 1,75,00,000 merely on the basis of disclosure made by the assessee and without any

corroborative evidence is bad in law, uncalled for, unjustified and the same should be deleted.

(2) For that in the facts and circumstances of the case the addition of Rs. 1,75,00,000 is bad in law, bad in facts and in violation of circulars and order of central board of direct taxes and hence the same be deleted.

(3) For that in the facts and circumstances of the case the appellate order passed was in violation of principals of natural justice hence is bad in law and be quashed.

(4) For that in the facts and circumstances of the case the assessment made u/s 153A of the IT Act 1961 was bad in law and hence the appellate order passed by the Ld CIT(A) based on the assessment order is bad in law and be quashed.

(5) For that in the facts and circumstances of the case the assessment made u/s 153A of the IT Act 1961 was without any satisfaction of the relevant Assessing officer hence the proceedings were bad in law and hence the order be quashed.

(6) For that in the facts and circumsances of the case, the additions/disallowances made u/s 153A of the IT Act 1961 was beyond the scope of the said section and hence bad in law and hence the order be quashed and/or the addition/ disallowances be deleted.

(7) For that in the facts and circumstances of the case the additions/ disallowances made u/s 153A of the IT Act 1961 was not based on any incriminating documents / material/ evidences found in the search which and hence the additions/ disallowance made were beyond the scope of the said section hence the appellate order passed by the Ld CIT(A) based on the assessment order is bad in law and be quashed and/or the addition/ disallowances be deleted.

(8) For that in the facts and circumstances of the case the assessment had abetted and hence the additions/ disallowances made u/s 153A of the IT Act 1961 was beyond the scope of the said section and hence the appellate order passed by the Ld CIT(A) based on the assessment order is bad in law and be quashed and/or the addition/ disallowances be deleted.

(9) For that in the facts and circumstance of this case the material based on which the Ld Assessment Officer passed the assessment order are collected behind the back of the assessee and which were not provided during the course of assessment proceeding, thus material should be excluded/ignored for the purpose of this case.

(10) For that in the facts and circumstances of the case the statement of third parties on which the Ld Assessment ^officer relied during the course of assessment proceeding were not subjected to cross examination for the assessee, thus the third-party statement relied upon should be excluded/ignored for the purpose of this case.

(11) For that the learned CIT (Appeals) erred in confirming the interest u/s 234 A/B/C the same was unjustified and hence the same be recalculated as per the applicable law.

(12) The appellant craves leave to produce additional evidences in terms of Rule 29 of the Income Tax (Appellate Tribunal) Rules 1963.

(13) The appellant craves leave to press new, additional grounds of appeal or modify, withdraw any of the above grounds at the time of hearing of the appeal.

6. The assessee has raised the following revised grounds of appeal in ITA No. 224/GAU/2019:-

(1) For that in the facts and circumstances of the case the Ld Assessing Officer erred in disallowing the provision of expenses of Rs.2,07,20,125 which was part of the cost of the projects of the assessee. Thus the addition made was unjustified, illegal and deleted.

(2) For that in the facts and circumstances of the case the lower authorities failed to consider that the expenses of Rs.2,07,20,125 had to be considered to determine the real income of the project and therefore the said expenditure has to be allowed in computing the income of the assessee.

(3) For that in the facts and circumstances of the case the lower authorities failed to appreciate that the books of accounts of the assessee were audited and the same were not rejected by the Ld Assessing Officer. Thus under the circumstances the disallowance of Rs.2,07,20,125 was not justified and the same be allowed in computing the income of the assessee.

(4) For that the lower authority erred in upholding the disallowance of Rs.67,993 oh account of penalty on Tax deducted source. Such expenses was allowable in law and hence the addition made be reversed.

(5) For that in the facts and circumstances of the case the appellate order passed was in violation of principals of natural justice hence is bad in law and be quashed.

(6) For that in the facts and circumstances of the case the assessment made u/s 143(3) of the IT Act 1961 was bad in law and hence the appellate order passed by the Ld CIT(A) based on the assessment order is bad in law and be quashed.

(7) For that in the facts and circumstances of the case the assessment made u/s 143(3) of the IT Act 1961 was without any satisfaction of the relevant Assessing officer hence the proceedings were bad in law and hence the order be quashed.

(8) For that in the facts and circumstances of the case the additions/ disallowances made u/s 143(3) of the IT Act 1961 was beyond the scope of the said section and hence bad in law and hence the order be quashed and/or the addition/ disallowances be deleted.

(9) For that in the facts and circumstance of this case the material based on which the Ld Assessment Officer passed the assessment order are collected behind the back of the assessee and which were not provided during the course of assessment proceeding, thus material should be excluded/ignored for the purpose of this case.

(10)For that in the facts and circumstances of the case the statement of third parties on which the Ld Assessment officer relied during the course of assessment proceeding were not subjected to cross examination for the assessee, thus the third-party statement relied upon should be excluded/ignored for the purpose of this case.

(11)For that the learned CIT (Appeals) erred in confirming the interest u/s 234 A/B/C the same was unjustified and hence the same be recalculated as per the applicable law.

(12)The appellant craves leave to produce additional evidences in terms of Rule 29 of the Income Tax (Appellate Tribunal) Rules 1963.

(13) *The appellant craves leave to press new, additional grounds of appeal or modify, withdraw any of the above grounds at the time of hearing of the appeal.*

7. Now we take ITA Nos. **219 & 224/GAU/2019** for A.Y. 2012-13.

ITA No. 219/GAU/2019 has emerged against an assessment proceeding carried out under section 153A read with section 143(3) of the Income Tax Act. The assessment order was passed on 31.12.2017.

ITA No. 224/GAU/2019 has emerged vide assessment order dated 30.03.2015 passed under section 143(3) of the Income Tax Act.

8. Before taking the grounds of appeal in a seriatim, we drew our attention to the brief facts namely, the assessee is engaged in the business of Real Estate. It has filed its original return electronically on 30.09.2012 declaring total income of Rs.53,69,210/-. A notice under section 143(2) was issued vide which case of the assessee was selected for scrutiny assessment under CASS. The ld. Assessing Officer has passed the assessment order on 30.03.2015. He determined the taxable income of the assessee at Rs.2,66,31,152/- as against Rs.53,69,210/- declared by the assessee. After this assessment order, a

search was carried out at the premises of the assessee on 17.09.2015. The ld. Assessing Officer thereafter issued a notice under section 153A of the Income Tax Act. The assessee has filed return of income in response to this notice on 28.11.2017 declaring total income at Rs.58,43,030/-. It is also pertinent to note that original return dated 30.09.2012 was revised on 07.02.2013 whereby income was declared to Rs.58,43,030/-.

9. The ld. Assessing Officer has passed the fresh assessment order under section 153A of the Income Tax Act and determined the income of the assessee at Rs.5,22,43,030/-

10. Dissatisfied with the assessment order dated 30.03.2015 passed under section 143(3) of the Income Tax Act, the assessee carried the matter in appeal. This appeal was decided by the ld. 1st Appellate Authority on 18.02.2019, whereas the appeal against the order of assessment passed under section 153A on 31.12.2017 has been decided prior to this appeal on 15.02.2019.

11. As far as the ITA No. 219/GAU/2019 is concerned, as observed, it emanates from an assessment order passed under section 153A/143(3) dated 31.12.2017. In this assessment order, ld. Assessing Officer has made an addition of Rs.4,70,00,000/-. In paragraph no. 3 of the

assessment order, ld. Assessing Officer has noted the details of 15 companies and observed that the assessee has received an aggregate amount of Rs.4,70,00,000/- from typical Kolkata-based jamakharchi companies. In his opinion, these transactions are bogus and, therefore, he made addition of this amount under section 68 of the Income Tax Act.

12. On appeal, ld. 1st Appellate Authority has reproduced the assessment order and thereafter observed that the assessee was supposed to give fresh written submission because its first submission was not complete. Since the assessee failed to give any submission, therefore, ld. CIT(Appeals) instead of considering the details, dismissed the appeal.

13. Before us, a detailed paper book containing 672 pages has been filed. Similarly ledger account running into 231 pages has also been filed in this assessment year. The ld. Counsel for the assessee while impugning the order of ld. CIT(Appeals) dated 15.02.2019 passed on an assessment under section 153A submitted that ld. Assessing Officer has not referred discovery of any incriminating material in the assessment order. As far as the share application money received by the assessee is concerned, it is already in the books of account and assessment under section 143(3) has been passed but it

was not disbelieved, no addition was made. Thus, unless some fresh material was found during the course of search, how the revenue can disturb the issue, which has already attained finality. He made reference to the assessment order dated 30.03,.2015 passed under section 143(3) before the search was carried out upon the assessee.

14. The ld. D.R., on the other hand, drew our attention towards paragraph no. 3.1 of the assessment order and submitted that during the course of search, one Inspector was deputed to carry out spot verifications at Chokhani Group, who indulged providing accommodation and his finding demonstrated that this share application money was bogus.

15. We have duly considered the rival contentions. There is no doubt that the assessee has filed the original return of income under section 139 of the Income Tax Act and assessment was framed under section 143(3) and no addition was made *qua* bogus share application. After the search, such an assessment can be disturbed or could be construed as abated only if incriminating material was found and seized during the course of search. The scope of section 153A has been explained in a large number of decisions and for the sake of completeness of the finding, we note our finding from

IT(SS)A Nos. 26 & 27/KOL/2021 in the case of GPT Sons (P) Limited, wherein we have made reference to the judgment of the Hon'ble Delhi High Court in the case of Kabul Chawla reported in 380 ITR 573 (Del.), judgment of Hon'ble Gujarat High Court in the case of Saumya Construction and judgment of the Hon'ble Calcutta High Court in the caes of Salasar Stock Broking Pvt. Limited. Our finding read as under:-

> *"8. We have duly considered rival contentions and gone through the record carefully. Before adverting to the facts and alleged seized material considered by the ld.AO for making the addition in the hands of the present assessees, we deem it appropriate to bear in mind the position of law propounded in various authoritative judgments expounding scope of section 153A of the Act. We are of the view that in this regard, there were large numbers of decisions. First we refer to the decision of Hon'ble Delhi High Court in the case of CIT Vs. Kabul Chawla, 380 ITR 573 (Del). Hon'ble Delhi High Court after detailed analysis has summarized the following legal position:*
>
> > *37. On a conspectus of Section 153A(1) of the Act, read with the provisos thereto, and in the light of the law explained in the aforementioned decisions, the legal position that emerges is as under:*
> >
> > *i. Once a search takes place under Section 132 of the Act, notice under Section 153 A(1) will have to be mandatorily issued to the person searched requiring him to file returns for six AYs immediately preceding the previous year relevant to the AY in which the search takes place.*
> >
> > *ii. Assessments and reassessments pending on the date of the search shall abate. The total income for such AYs will have to be computed by the AOs as a fresh exercise.*
> >
> > *iii. The AO will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search takes place. The AO has the power to assess and reassess the 'total income' of the*

aforementioned six years in separate assessment orders for each of the six years. In other words there will be only one assessment order in respect of each of the six AYs "in which both the disclosed and the undisclosed income would be brought to tax".

iv. Although Section 153 A does not say that additions should be strictly made on the basis of evidence found in the course of the search, or other post-search material or information available with the AO which can be related to the evidence found, it does not mean that the assessment "can be arbitrary or made without any relevance or nexus with the seized material. Obviously an assessment has to be made under this Section only on the basis of seized material."

v. In absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made. The word 'assess' in Section 153 A relatable to abated proceedings (i.e. those pending on the date of search) and the word 'reassess' to completed assessment proceedings.

vi. Insofar as pending assessments are concerned, the jurisdiction to make the original assessment and the assessment under Section 153A merges into one. Only one assessment shall be made separately for each AY on the basis of the findings of the search and any other material existing or brought on the record of the AO.

vii. Completed assessments can be interfered with by the AO while making the assessment under Section 153 A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment."

ITAT, Delhi Bench in the case of DIT Vs. Smt. Shivali Mahajan and others, rendered in ITA No.5585/Del/2015 has considered this aspect in its decision. Thereafter, the Tribunal has specifically held that serial no.(iv) of the above proposition, the Hon'ble Delhi High Court has specifically held that assessment under section 153A of the Act has to be

specifically made on the basis of seized material. ITAT Delhi Bench was considering an aspect whether the evidence in the shape of books of accounts, money, bullion, jewellery found during the course of search relates to other person than the searched person, can that be considered while making assessment under section 153A of the Act. ITAT Delhi Bench has specifically held that material recovered from the premises of other person cannot be used in the hands of the searched person. For that purpose an assessment under section 153C or 147 is to be made. At this stage, in order to fortify ourselves, we would like to make reference to the following paragraphs of the ITAT Delhi Bench's order. It reads as under:

> *"15. Thus, when during the course of search of an assessee any books, document or money, bullion, jewellery etc. is found which relates to a person other than the person searched, then the Assessing Officer of the person searched shall hand over such books of account, documents, or valuables to the Assessing Officer of such other person and thereafter, the Assessing Officer of such other person can proceed against such other person. However, in the case under appeal before us, admittedly, Section 153C is not invoked in the case of the assessee and the assessment is framed under Section 153A. We, respectfully following the above decisions of Hon'ble Jurisdictional High Court, hold that during the course of assessment under Section 153A, the incriminating material, if any, found during the course of search of the assessee only can be utilized and not the material found in the search of any other person."*

Order of the ITAT Delhi Bench in other cases viz. Asha Rani Lakhotia vs. ACIT and Subhag Khattar Vs. ACIT are on the same line.

Hon'ble Delhi High Court in the case of Subhag Khattar in Tax Appeal No.60 of 2017 has considered the following question of law:

> *"Did the Income Tax Appellate Tribunal (ITAT) fall into error in holding that the additions made under Section 153A read with Section 143(3) of the*

> *Income Tax Act, 1961 in the circumstances of the case, were not justified and supportable in law?"*

After putting reliance upon its decision in the case of CIT Vs. Kabul Chawla (supra) has replied this question as under:

> *"6. The Assessee went in appeal before the Commissioner of Income Tax (Appeals) who dismissed it by an order dated 27th November, 2014. A further appeal was filed by the Assessee before the ITAT. The ITAT, inter alia, found substance in the contention of the Assessee that the assessment under Section 153(A) of the Act, in the absence of any incriminating material found during the search on the premises of the Assessee was not sustainable in law. Reliance was placed on the decision of this Court in Commissioner of Income Tax v. Kabul Chawla, [2016] 380 ITR 573.*
>
> *7. A question was posed to the learned counsel for the Revenue whether in the present case anything incriminating has been found when the premises of the Assessee was searched. The answer was in the negative. The entire case against the Assessee was based on what was found during the search of the premises of the AEZ Group. It is thus apparent on the face of it, that the notice to the Assessee under Section 153A of the Act was misconceived since the socalled incriminating material was not found during the search of the Assessee's premises. The Revenue could have proceeded against the Assessee on the basis of the documents discovered under any other provision of law, but certainly, not under Section 153A. This goes to the root of the matter."*

9. Hon'ble Court has specifically observed for the purpose of section 153A that only seized material is required. However, if there is any other incriminating material belong to the assessee found at the premises of the some other person, then the assessment has to be made under other provisions and not under section 153A of the Act.

10. Hon'ble Gujrat High Court has also considered the decision of Hon'ble Delhi High Court in the case of CIT Vs. Kabul Chawla (supra). Hon'ble Gujarat High Court framed the following question of law in the case of Pr.CIT Vs. Saumya Construction (supra):

> *"[A] Whether the order of Tribunal is right in law and on facts in deleting the addition made in assessment made u/s 153A of the Act?*
>
> *[B] Whether the Tribunal is right in law in holding that the addition should be based on the incriminating material found during the course of search under new procedure of assessment u/s 153A which is different from earlier procedure u/s 158BC r.w.s. 158BB of the Act and by reading into the section, the words 'the incriminating material found during the course of search' which are not there in section 153A?*
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> *[C] Whether the Tribunal erred in relying on the ITAT order in Sanjay Aggarwal v. DCIT (2014) 47 Taxmann.Com 210 (Del) which has interpreted undisclosed income unearthed during the search to imply incriminating material, as against the finding of the Delhi High Court in Filatex India Ltd. v. CIT- IV (2015) 229 Taxman 555 wherein it is held that during the assessment u/s 153A additions need not be restricted or limited to incriminating material found during the course of search?"*

35. Hon'ble Court concurred with the decision of Hon'ble Delhi High Court. We deem it appropriate to take note of relevant part of the decision, which reads as under:

> *"16. Section 153A bears the heading "Assessment in case of search or requisition". It is well settled as held by the Supreme Court in a catena of decisions that the heading of the section can be regarded as a key to the interpretation of the operative portion of the section and if there is no ambiguity in the language or if it is plain and clear, then the heading used in the section strengthens that meaning. From the heading of section 153, the intention of the legislature is clear viz., to provide for assessment in case of search and requisition. When the very purpose of the provision is to make assessment in case of search or requisition, it goes without saying that the assessment has to have relation to the search or requisition. In other words, the assessment should be connected with something found during the search or requisition, viz., incriminating material which reveals undisclosed income. Thus, while in view of the mandate of sub-section (1) of section*

153A of the Act, in every case where there is a search or requisition, the Assessing Officer is obliged to issue notice to such person to furnish returns of income for the six years preceding the assessment year relevant to the previous year in which the search is conducted or requisition is made, any addition or disallowance can be made only on the basis of material collected during the search or requisition. In case no incriminating material is found, as held by the Rajasthan High Court in the case of Jai Steel (India) (supra), the earlier assessment would have to be reiterated. In case where pending assessments have abated, the Assessing Officer can pass assessment orders for each of the six years determining the total income of the assessee which would include income declared in the returns, if any, furnished by the assessee as well as undisclosed income, if any, unearthed during the search or requisition. In case where a pending reassessment under section 147 of the Act has abated, needless to state that the scope and ambit of the assessment would include any order which the Assessing Officer could have passed under section 147 of the Act as well as under section 153A of the Act.

17. In the facts of the present case, a search came to be conducted on 07.10.2009 and the notice was issued to the assessee under section 153A of the Act for assessment year 2006-07 on 04.08.2010. In response to the notice, the assessee filed return of income on 18.11.2010. In terms of section 153B, the assessment was required to be completed within a period of two years from the end of the financial year in which the search came to be carried out, namely, on or before 31st March, 2012. Here, insofar as the impugned addition is concerned, the notice in respect thereof came to be issued on 19.12.2011 seeking an explanation from the assessee. The assessee gave its response by reply dated 21.12.2011 calling upon the Assessing Officer to provide copies of statements recorded on oath of Shri Rohit P. Modi and Smt. Pareshaben K. Modi during the search as well as the copies of the documents upon which the department placed reliance for the purpose of making the proposed addition as well as the copy of the explanation given by Shri Rohit P. Modi and Smt. Pareshaben K. Modi regarding the on-money received, copies of the assessment orders in case of said persons and also requested the Assessing Officer to permit him to cross-examine the said persons. The Assessing

Officer issued summons to the said persons, however, they were out of station and it was not known as to when they would return. In this backdrop, without affording any opportunity to the assessee to cross-examine the said persons, the Assessing Officer made the addition in question.

18. In this case, it is not the case of the appellant that any incriminating material in respect of the assessment year under consideration was found during the course of search. At the relevant time when the notice came to be issued under section 153A of the Act, the assessee filed its return of income. Much later, at the fag end of the period within which the order under section 153A of the Act was to be made, in other words, when the limit for framing the assessment as provided under section 153 was about to expire, the notice has been issued in the present case seeking to make the proposed addition of Rs.11,05,51,000/- on the basis of the material which was not found during the course of search, but on the basis of a statement of another person. In the opinion of this court, in a case like the present one, where an assessment has been framed earlier and no assessment or reassessment was pending on the date of initiation of search under section 132 or making of requisition under section 132A, while computing the total income of the assessee under section 153A of the Act, additions or disallowances can be made only on the basis of the incriminating material found during the search or requisition. In the present case, it is an admitted position that no incriminating material was found during the course of search, however, it is on the basis of some material collected by the Assessing Officer much subsequent to the search, that the impugned additions came to be made.

19. On behalf of the appellant, it has been contended that if any incriminating material is found, notwithstanding that in relation to the year under consideration, no incriminating material is found, it would be permissible to make additions and disallowance in respect of all the six assessment years. In the opinion of this court, the said contention does not merit acceptance, inasmuch as, the assessment in respect of each of the six assessment years is a separate and distinct assessment. Under section 153A of the Act, an assessment has to be made in relation to the search or requisition, namely, in relation to material

disclosed during the search or requisition. If in relation to any assessment year, no incriminating material is found, no addition or disallowance can be made in relation to that assessment year in exercise of powers under section 153A of the Act and the earlier assessment shall have to be reiterated. In this regard, this court is in complete agreement with the view adopted by the Rajasthan High Court in the case of Jai Steel (India), Jodhpur (supra). Besides, as rightly pointed out by the learned counsel for the respondent, the controversy involved in the present case stands concluded by the decision of this court in the case of Jayaben Ratilal Sorathia (supra) wherein it has been held that while it cannot be disputed that considering section 153A of the Act, the Assessing Officer can reopen and/or assess the return with respect to six preceding years; however, there must be some incriminating material available with the Assessing Officer with respect to the sale transactions in the particular assessment year.

20. For the foregoing reasons, it is not possible to state that the impugned order passed by the Tribunal suffers from any legal infirmity so as to give rise to a question of law, much less, a substantial question of law, warranting interference. The appeal, therefore, fails and is, accordingly, dismissed."

11. It is also pertinent to note that, in the case of Kabul Chawla (supra), the Hon'ble Delhi High Court in its concluding paragraph has observed that, on the date of the search, the assessments for assessment years 2002-03, 2005-06 and 2006-07 already stood completed and the returns in these years were accepted under Section 143(1) of the Act and these acceptance of returns processed under Section 143(1) of the Act was construed by the Hon'ble Delhi Court as completion of assessments and this acceptance of return, according to the Hon'ble Delhi High Court, could be tinkered with if some incriminating material was found at the premises of the assessee.

12. The position of law in other decisions referred by the ld. Counsel for the assessee is identical; particularly we have considered the judgment of Hon'ble Calcutta High Court in the case of PCIT vs. Salasar Stock Broking Pvt. Ltd. (supra)".

16. On the strength of above, if we examine the facts of the present case, then it would reveal that nothing was discovered during the course of search about this share application money. Taking the advantage of search, ld. Assessing Officer is reassessing the income of the assessee, which has already assessed in an assessment order under section 143(3). The factum of share application money is already available in the books. It has to be assumed as examined in a scrutiny assessment. For buttressing this point, the judgment of the Hon'ble Supreme Court in the case of CIT –vs.- Kelvinator India Limited reported in 320 ITR 561 (SC), can be put into service.

17. In view of the above discussion, this addition is not sustainable, hence it is deleted.

18. The assessee has raised a large number of other grounds as noticed above, but they are peripheral arguments *qua* the central points, hence in view of the above, addition of Rs.4,70,00,000/- is deleted. This ground of appeal is allowed.

19. Now we take **ITA No. 224/GAU/2019**. In this appeal, grievance of the assessee is that ld. CIT(Appeals) has erred in confirming the addition of Rs.2,07,20,125/-.

20. We have noticed the facts earlier. A perusal of the assessment order would indicate that ld. Assessing Officer has made the addition on the ground that the assessee has debited Rs.17,05,07,850/- towards material used and other direct expenses, which formed part of work-in-progress. He pointed out certain items, which reflect the provisions. The details of all these items have been noticed by the ld. Assessing Officer in paragraph no. 5 under (xxiii) sub-heads. The ld. Assessing Officer has disallowed the provisions and made the addition.

21. Appeal to the ld. CIT(Appeals) did not bring any relief. The ld. CIT(Appeals) concurred with the ld. Assessing Officer by observing that assessee had claimed certain expenses, which were found to be in the nature of provisions and being unascertained liabilities, they cannot be allowed to the assessee. The assessee has submitted before the ld. CIT(Appeals) that it is revenue neutral item because this provision is already included in the value of closing work-in-progress. The ld. CIT(Appeals) observed that alleged provisions, if were included in the value of closing WIP, then it could not be proved by the assessee and, therefore, they are not to be allowed.

22. We have duly considered the rival contentions and with their assistance gone through the record carefully. The assessee has made a detailed representation on this

issue. The stand of the assessee is that both the authorities have erred in disallowing the entire provision of expenses. According to the assessee, it has made provision, which was debited to the profit & loss account and correspondingly enhanced the WIP. If it is disallowed to the assessee as expenditure, then its inclusion from the WIP has also to be excluded. If this exercise is not being carried out by the ld. Assessing Officer, then the profit ratio would increase at 19.12%, which is a very abnormal profit in the line of construction.

23. We have duly considered the rival contentions and gone through the record carefully. A provision is being made in the accounts for contingent liability. Sometime a liability is discernable but its complete crystallization cannot be ensured on the basis of material available and therefore, a provision of certain expenses are being made and if a provision is found genuine reasonable *qua* need of the business based on earlier years feed back, then it can be allowed as a deduction namely in the case of assessee under Head No. 5 provision of Bank interest at Rs.46,40,000/- has been made. There cannot be any doubt about this liability. The assessee has claimed this provision as a deduction. It was under the impression that this provision is allowed. Therefore, it took this amount to the work-in-progress, which is to be sold in

subsequent years. The ld. Assessing Officer has disallowed the deduction of this provision and correspondingly did not exclude from the work-in-progress. Both these things cannot be permitted simultaneously. There is no finding at the end of the ld. Assessing Officer that expenses are not genuine. He did not make any enquiry *qua* the nature of expenses and whether they can be termed as genuine or not. He simply took a short-cut method by treating the provision as disallowed. He has to verify if this provision has been included in the WIP or not. If included then it is to be adjudicated once it has not been allowed as a deduction then it is to be excluded from the WIP also. This expense be carried out after going through the detailed explanation of the assessee and ledger account, we are of the view that this issue be remitted to the file of ld. Assessing Officer for fresh adjudication.

24. In the result, ITA Nos. 219/GAU/2019 is allowed and ITA No. 224/GAU/2019 is allowed for statistical purposes.

25. Now we take **ITA No. 222/GAU/2019.**

The assesse is in appeal before the Tribunal against the order of ld. CIT(Appeals), Guwahati-2, Guwahati dated 15.02.2019 passed for A.Y. 2015-16.

26. Though the assessee has taken thirteen grounds of appeal in the revised grounds of appeal and three grounds of appeal in the original grounds of appeal, in brief, its grievance is that ld. CIT(Appeals) has erred in confirming the addition of Rs.1,75,00,000/- without adjudicating the issues on merit.

27. Brief facts of the case are that a search under section 132 of the Income Tax Act was carried out on 17.09.2015 in the residential as well as at the office premises of M/s. Agrim Infraproject Private Limited and its Directors. A notice under section 153A was issued and served upon the assesese. The assessee has filed its return of income on 28.11.2017 declaring total income at Rs.1,76,45,,600/-. The ld. Assessing Officer has passed a very brief assessment order and has made addition of equal amount, his finding reads as under:-

During the assessment proceeding following issues cropped up :

During the course of search & seizure proceeding, a sum of Rs.1.75 crore was disclosed by the Director of the assessee company, Shri Vishnu Chokhani as additional income over and above the normal profit shown by the assessee. During the course of assessment proceeding, it was seen that the assessee had shown net profit @5.39% for the relevant A.Y. The net profit for the A.Y. 2016-17 and A.Y. 2014-15 were shown at 5.41% and 10% respectively. Thus the net profit of Rs.1,75,44,529/- @5.39% of the turnover is nothing but the normal profit for the A.Y. under consideration.

During the course of search & seizure on 17/09/2015 at residential premises of Mukesh Chokhani at Protech Residency, Hengrabari Guwahati, cash amounting to Rs.18,95,000/- were found out of which it was explained by one of the Director of the assessee company Shri Vishnu Chokhani in the statement recorded u/s. 132(4) of the I.T. Act that the said money belong to the assessee company. Accordingly, an amount of Rs.18,00,000/- was seized as undisclosed/unexplained cash. The assessee also admitted income for the financial year 2014-15 relevant to the A.Y. 2015-16 of Rs.1,75,00,000/-.

However, it is seen that the assessee had shown only normal profit @ 5.39% of Rs.1,75,44,529/- against a turnover of Rs. 32,47,46,307/- in the A.Y. 2015-16 . The assessee had not shown the additional income of Rs.1,75,00,000/- in its computation of total income or in the profit and loss a/c. As such, the undisclosed profit of Rs.1,75,00,000/- which has been admitted by the assessee admitting its commission and omission during the course of search & seizure is now added back to the total income of the assessee as undisclosed income.

Accordingly, Penalty proceeding u/s 271AAB(1)(c) of the I.T. Act is initiated for furnishing inaccurate particular of aforesaid income . Notice u/s 274 r.w.s 271AAB (1) (a) of the Income Tax Act is issued separately.

[Addition : Rs. 1,75,00,000]

COMPUTATION OF TOTAL INCOME

	(In Rs.)	(In Rs.)
Income from Business		1,76,45,596/-
Disclosure Income over and above normal Profit	1,75,00,000	1,75,00,000/-
Gross Total Income		3,51,45,596/-
Assessed Total Income		3,51,45,596/-
Rounded off u/s. 288A		3,51,45,600/-

Notice u/s 274 r.w.s 271AAB (1) (c) of the Income Tax Act is issued separately.

Assessed as above u/s 153A/ 143(3) of the Income Tax Act, 1961. Charge interest u/s 234A/234B/234C of Income Tax Act, 1961 as applicable. Give due credit for pre-paid taxes as reflected in the AST (ITD System) after due verification. Issue Demand Notice u/s 156 and Challan and copy of Assessment Order to the assessee accordingly. Tax calculation as per System is shown separately.

This order is passed with the previous approval of the Addl. Commissioner of Income-tax, Range-3, Guwahati issued u/s 153D of the I.T. Act, vide his letter F. No. A-18/Addl. CIT/R-3/GHY/2017-18/1719 dated 30.12.2017.

[N. Kheda Varta Singh]
Deputy Commissioner of Income Tax,
Circle – 3, Guwahati

28. Dissatisfied with this addition, the assessee carried the matter in appeal before the ld. CIT(Appeals). The ld. 1st Appellate Authority has dismissed the appeal for want of prosecution. She has reproduced certain Interim Order-sheet entries in the impugned order and thereafter held that assessee did not file detailed submission, therefore, its appeal is dismissed. This order can never be termed as a speaking order.

29. While impugning the orders of Revenue authorities, ld. Counsel for the assessee submitted that the ld. Assessing Officer has not discussed any detail except a reference to the statement of assessee, whereby under section 132(4), he has made disclosure. The copy of such statement has been placed on the paper book from pages no. 1 to 4. On the other hand, ld. D.R. relied upon the order of ld. Assessing Officer.

30. We have duly considered the rival contentions and gone through the record carefully. We have taken note of the finding recorded by the ld. Assessing Officer. In the finding, no corroborative evidence is discernable except the reliance upon the disclosure made in the statement recorded under section 132(4) of the Income Tax Act. The relevant part of the statement of Shri Vishnu Kant Chokhani, S/o Late Jiwanrum Chokhani recorded under

section 132(4) of the Income Tax Act on 13.11.2015 reads as under:-

Q.1: Please identify youself.

Ans. I am Shri Vishnu Kant Chokhani S/o. Late Jiwanram Chokhani aged about 48 years, a resident of Aakashdeep Building Opp. S P. Textile, Police Bazar, Shillong- 793001 Meghalaya. 1 can read, write and speak Hindi and English.

Q. 2 Are you aware of the consequence of statements you are going to give on oath?

Ans. Yes.

Q.3. 1 am showing you the statement of Shri Narendra Balesia recorded under section 133A of the. I.T. Act, 1961 on 07.04.2015 by the DDIT flnv), Kolkata wherein he has stated that various paper companies controlled and managed by different entry operators are trading in different penny stocks including the scrip of M/s CCL International Ltd. through broking firms for providing accommodation entries in the form of Long Term Capital Gain to various beneficiaries] He has also stated that Shri Devesh Upadhyaya is one of the entry operators involved in jacking up the price of shares of the scrip M/s CCL International Ltd. to a desired level with the concerted and regular buying and selling of shares by dummy persons and/or paper companies/HUF controlled and managed by the entry operators. I am now showing you the statement of Shri Devesh Upadhyaya recorded under oath u/s 131 of the I.T. Act, 1961 on 02.03.015 by the DDIT(Inv), Kolkata wherein he has confirmed his role in providing accommodation entries of bogus LTCG for the purpose of routing the unaccounted money of beneficiaries through various entities controlled by him by buying shares of certain penny stocks including the scrip M/s CCL International Ltd. I am also showing you the statement of Shri Anand Chokhani recorded under oath u/s 131 of the I.T. Act, 1961 on 30.03.2015 by DDIT (Inv) Kolkata wherein it has been stated that the beneficiaries are advised to purchase shares of the company at very nominal prices either through stock exchange or through off market transactions and then the share prices are manipulated on the stock exchange through controlled transactions of the shares through a number of paper companies. It is further stated that the shares of the scrip are then purchased from the beneficiary shareholders at very high prices through managed transactions thereby enabling the beneficiaries to book exempted

LTCG against payment of equivalent amount in cash and managing to covert black money of the beneficiaries in the form of Long Term Capital Gain. I am further showing you the statements of Shri Rakesh Somani recorded under oath u/s 133A of the I.T. Act, 1961 on 30.03.2015 by DDlT(Inv) Kolkata, of Shri Sanjay Kumar Parakh recorded under oath u/s 133A of the I.T. Act, 1961 on 26.02.2015 by DDIT(Inv) Kolkata and of Shri Prateek Agarwal recorded under oath u/s 133A of the I.T. Act, 1961 on 23.12.2014 by DDIT(Inv) Kolkata wherein they have also admitted the above-stated modus operandi in respect of the scrip M/s CCL International Ltd. What do you have to say about the LTCG that you have booked in the same scrip M/s Kailash Auto Finance (P) Ltd. in the light of the above revelations? Further please see the statement of Shri Pradeep jain and its enclosure of the type of company in which LTCG entry has been done. What do you have to say on the above revelations?

In the light of the above discussion you and your concerns have made bogus investment in tented penny stocks to receive LTCG. The details of these transaction are given below:-

Si. No.	***Beneficiaries***	***Penny Stock***	*Amount of LTCG (Rs.)*
1.	***BRAHMADUTT CHOKHANI***	***KAILASH AUTO FINANCE LTD.***	***1,68,30,300***
2.	***VISHNU KANT CHOKHANI***	***KAILASH AUTO FINANCE LTD.***	***1,41,27,050***
3.	***KAVITA CHOKHANI***	***KAILASH AUTO FINANCE LTD.***	***1,67,82,500***
4.	***KAMLA DEVI CHOKHANI***	***KAILASH AUTO FINANCE LTD.***	***1,67,12,210***
5.	***BRAHMADUTT CHOKHANI AND SONS (HUF)***	***KAILASH AUTO FINANCE LTD.***	***1,66,75,000***
6.	***VISHNU CHOKHANI AND SONS (HUF)***	*KAILASH* ***AUTO FINANCE*** *LTD.*	***J',34,72,155***
		Total	***9,45,99,215***

Ans. I and my family members have earned long term capital gain of around the said amount through share transactions in the script of Kailash Auto Finance Ltd. To avoid vexed litigation with the Department as well as to buy peace of mind though the above shares were transacted by us genuinely, 1 hereby on my behalf and on behalf of my family members voluntarily offer to pay tax on the above LTCG of Rs.9,45,99,215/-as income from other sources to avoid any further litigation provided no adverse inference is drawn on my agreeing to pay the tax on the above amount and no penalty is levied. Further, certain documents have been seized during the

course of search and seizure operation carried out in my group. 1 fear that the said documents may lead to complex investigation or enquiry and protracted litigation with the department. Therefore, to buy peace and to avoid such action, I hereby like to disclose undisclosed income of Rs.55 lacks u/s. 132(4) of the I T Act, 1961 of my group for the current year. The party-wise break-up of the above income now disclosed shall be furnished later on after going through the accounts and documents".

31. Apart from the above disclosure statement, no other document is being referred by the ld. Assessing Officer. No doubt, the disclosure or admission made under section 132(4) of the Act during the search proceeding is an admissible evidence but not conclusive one. This presumption of admissibility of evidence is a rebuttal one and if the assessee is able to demonstrate with the help of some material that such admission was either mistaken, untrue or under some misconception of fact, then solely on the basis of such admission, no addition is required to be made. It is true that admissions being declaration against interest are good evidence but they are not conclusive and parties always at liberty to withdraw the admission by proving that they are either mistaken or untrue. In law retracted confession even may form the legal basis of addition, if ld. Assessing Officer is satisfied that it was true and was voluntarily made but basing the addition or retracted declaration solely would not be safe. It is not a strict Rule of Law but only a Rule of Prudence. As a general rule of practice, it is unsafe to ruly upon an retracted confession without corroborative evidence. Due to this situation, the Board

has issued a Circular No. 286/2/2013, which prohibits the department i.e. search party to take any confession in the search. The CBDT is of the view that oftenly officials used to obtain confession from the assessee and stop further recovery of material. Such confessions have been retracted and then the addition could not withstand the scrutiny of higher authorities because no material was found supporting such addition. Keeping in view the above principle, the Board has restrained the authorities from taking confession under section 132(4) of the Income Tax Act. There are a large number of decisions which suggest that without corroborating evidence, addition ought not to be made on the basis of a declaration made under section 132(4) of the Income Tax Act.

32. A perusal of the above questionnaire reveals that name of the assessee i.e. M/s. Agrim Infraproject Pvt. Limited is not discernable in the table of investor from Serial No. 1 to 6, neither it is reflected in the answer. In the answer, a declaration of the Director is confined to Rs.9,45,99,215/-, which is relatable to six individuals alongwith HUF, so even there is no disclosure on behalf of the Company i.e. M/s. Agrim Infraproject Pvt. Limited. Therefore, this addition is not sustainable in the eyes of law. The addition of Rs.1,75,00,000/- is accordingly deleted. All other grounds are peripheral to the addition

qua the central point, hence do not require any adjudication.

33. In the result, this appeal of the assessee i.e. ITA No. 222/GAU/2019 is partly allowed.

34. To sum up, the ITA No. 219/GAU/2019 is allowed and ITA No. 224/GAU/2019 is allowed for statistical purposes. ITA No. 222/GAU/2019 is partly allowed.

Order pronounced in the open Court on April 5th, 2023.

Sd/-	**Sd/-**
(Manish Borad)	**(Rajpal Yadav)**
Accountant Member	**Vice-President)**

Kolkata, the 5th day of April, 2023

Copies to : *(1)* ***Agrim Infraproject Private Limited, C/o. Rahul Raj Jain & Co., H. No. 15, 1st Floor, Bye Lane-2, Shaktigarh Path, Bhangagarh, G.S. Road, Assam-781005***

(2) Deputy Commissioner of Income Tax, Circle-3, Guwahati, Office of the Deputy Commissioner of Income Tax, 6th Floor, Aayakar Bhawan, Christian Basti, G.S. Road, Assam-781005

(3) Commissioner of Income Tax (Appeals), Guwahati-2, Guwahati

(4) Commissioner of Income Tax- ,

(5) The Departmental Representative
(6) Guard File

TRUE COPY

By order

Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata

Laha/Sr. P.S.